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SCHUTTE BAGCLOSURES INC.,

Plaintiff,

v.

KWIK LOK CORPORATION,

Defendant.

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KWIK LOK CORPORATION,

Counterclaim Plaintiff,

v.

SCHUTTE BAGCLOSURES INC.

SCHUTTE BAGCLOSURES B.V.

Counterclaim Defendants.

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) Case No. 12-cv-5541 (JGK)

) ECF CASE

) **STATEMENT OF UNDISPUTED**

) **FACTS AS TO WHICH THERE IS NO**

) **MATERIAL ISSUE TO BE TRIED**

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**LEGEND**

For the purposes of Defendant-Counterclaim Plaintiff's Statement of Undisputed Facts in Support of Its Motion for Summary Judgment, the following abbreviations shall be used:

1. "Abbenhuis Decl. in Support of Mot. to Dismiss Countercl." means the Affidavit of Wout Abbenhuis dated December 21, 2013, Dkt. 57.
2. "Abbenhuis Dep." means the Deposition of Wout Abbenhuis dated January 29, 2014, April 14, 2014 and April 15, 2014.
3. "Am. Compl." means the Amended Complaint dated December 10, 2012, Dkt. 16.
4. "Compl." means the initial Complaint dated July 18, 2012, Dkt. 1.
5. "McQuillen Decl." means the Declaration of Brian McQuillen in Support of Defendant's Motion for Summary Judgment dated May 23, 2014.
6. "Sec. Am. Compl." means the Second Amended Complaint dated August 6, 2013, Dkt. 31.
7. "Schutte Mot. to Dismiss Countercl." means the Memorandum of Law in Support of the Motion by Counterclaim Defendants Schutte Bagclosures Inc. and Schutte Bagclosures B.V. to Dismiss Kwik Lok Corporation's Counterclaims dated December 27, 2013, Dkt. 56.
8. "Schutte Products" refers to all eleven Schutte products identified in Exhibit D of the Amended Complaint that are the subject of Schutte Inc.'s declaratory judgment claims in this suit.
9. "Van Drunen Dep." means the Deposition of Frank Van Drunen dated April 9, 2014
10. "Willemsen Dep." means the Deposition of Jacob Willemsen dated January 28, 2014.

**STATEMENT OF MATERIAL FACTS PURSUANT TO LOCAL RULE 56.1 IN  
SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

Pursuant to Local Rule 56.1(a) of the United States District Court for the Southern District of New York, Defendant-Counterclaim Plaintiff Kwik Lok Corporation, ("Kwik Lok") hereby submits the following Statement of Material Facts As To Which There is No Genuine Issue to Be Tried.

**I. PRIOR LITIGATION BETWEEN THE PARTIES ONLY INVOLVED THE SCHUTLOK G SERIES PLASTIC BAG CLOSURE PRODUCT**

<b>Undisputed Fact</b>	<b>Evidence</b>
1. Kwik Lok sued Schutte Bagclsoures B.V. in 2006 in the Netherlands	McQuillen Decl. ¶ 2, Ex. A; KL0009226-9241; Sec. Am. Compl., Dkt. 31 ¶ 110
2. The only product at issue in the European litigation was the SCHUTLOK G series bag closure.	KL0009226-9241
3. Kwik Lok alleged in the European litigation that the SCHUTLOK G series infringed Kwik Lok's European patent 0.382.169, Kwik Lok's European community trade dress 558,429 and Kwik Lok's European community and Benelux registered trademarks in the word mark KWIK LOK.	KL0009226-9241; KL0009242-9247; KL0009248-9253; KL0009254-9256; KL0009257.
4. Kwik Lok's European community trade dress 558,429 is directed to the same product shape as that protected by the 043 Registration.	KL0009254-9256; Sec. Am. Compl., Dkt. 31, Exh. A.
5. The European litigation never involved an arched rectangular shaped closure similar to the 545 Registration that is currently the subject of Schutte's declaratory judgment claims in this case.	KL0009226-9241

Undisputed Fact	Evidence
6. No equivalent to the 804 Registration directed to a red logo showing a two-dimensional Kwik Lok bag closure and the letters KL inside the closure was ever at issue in the European litigation.	KL0009226-9241
7. Kwik Lok has never asserted the 043, 545 or 804 Registration in any litigation prior to this case.	
8. Kwik Lok has never claimed that the 804 Registration “gives Kwik Lok exclusive rights to the shape on which the word mark KL appears.”	
9. The 804 Registration is directed to a two-dimensional logo, not the shape of a product.	Sec. Am. Compl., Dkt. 31, Exh. C
10. [REDACTED] [REDACTED] [REDACTED] [REDACTED].	McQuillen Decl. ¶ 4, Ex. C, Van Drunen Dep. at 7:8-11; 11:9-13; 13:24-14:2; 14:24-15:2;
11. [REDACTED] [REDACTED] [REDACTED] [REDACTED].	McQuillen Decl. ¶ 6, Ex. E, Abbenhuis Dep. at 14:20-25; 21:2-17-20.
12. [REDACTED] [REDACTED], [REDACTED].	McQuillen Decl. ¶ 4, Ex. C, Van Drunen Dep. at 13:24-15:25; ¶ 2, Ex. A, March 30, 2010 appeal decision (KL0009226-9241)
13. Schutte relies on oral statements made by unidentified Kwik Lok representatives that defy common sense, specifically that Kwik Lok “would undertake all necessary actions” to prevent Schutte from “entering the U.S. market.”	Sec. Am. Compl., Dkt. 31, ¶¶ 116-117.

Undisputed Fact	Evidence
14. Any statements Kwik Lok did make were made during settlement discussions in connection with the pending litigation in the Netherlands and thus should be construed in that specific context.	Compl., Dkt. 1, ¶24; Am. Compl., Dkt. 16; Sec. Am. Compl., Dkt. 31, ¶¶116-117.
15. [REDACTED] [REDACTED] [REDACTED]	McQuillen Decl. ¶ 6, Ex. E, Abbenhuis Dep. at 213:21-214:18; 615-116; KL0001144-KL0001145; KL0001043-1045
16. [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]	McQuillen Decl. ¶ 6, Ex. E, Abbenhuis Dep. at 243:17-244:21

**II. SCHUTTE B.V. MANUFACTURES AND SELLS MANY DIFFERENT BAG CLOSURES PRODUCTS, BUT HAS NOT DECIDED IF IT INTENDS TO INTRODUCE SCHUTLOK BRANDED PRODUCTS IN THE UNITED STATES.**

Undisputed Fact	Evidence
17. [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]	McQuillen Decl. ¶ 6, Ex. E, Abbenhuis Dep. at 215:11-216:1; KL0001144-KL0001148.
18. [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]	McQuillen Decl. ¶ 6, Ex. E, Abbenhuis Dep. at 211:24-212:20; 213:21-214:18; Van Drunen Dep. at 131:20; KL0001144-KL0001145; KL0001043-1045.
19. [REDACTED] [REDACTED] [REDACTED] [REDACTED]	McQuillen Decl. ¶ 6, Ex. E, Abbenhuis Dep. at 211:24-212:20; 213:21-214:18; 615-116; KL0001144-KL0001145; KL0001043-1045.



<p>[REDACTED]</p>	
<p>20. [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]</p>	<p>McQuillen Decl. ¶ 6, Ex. E, Abbenhuis Dep. at 504-505; 315:9-12.</p>

### III. SCHUTTE INC. DOES NOT DISTRIBUTE THE “SCHUTTE PRODUCTS” IN NEW YORK

Undisputed Fact	Evidence
<p>21. Schutte’s plastic bag closure products come in a variety of forms, including the SCHUTLOK branded products A, B, T, K, GA and L and the CLIPPS branded products G, GL, BL, T and K.</p>	<p>McQuillen Decl. ¶ 5, Ex. D, Am. Compl., Dkt. 16, ¶ 74, Ex. D.</p>
<p>22. [REDACTED] [REDACTED] [REDACTED]</p>	<p>McQuillen Decl. ¶ 6, Ex. E, Abbenhuis Dep. 106:16-24.; 110:25-111:11.</p>
<p>23. [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]</p>	<p>McQuillen Decl. ¶ 6, Ex. E, Abbenhuis Dep. 106:16-24; Am. Compl., Dkt. 16, Ex. D.</p>
<p>24. [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]</p>	<p>McQuillen Decl. ¶ 6, Ex. E, Abbenhuis Dep. 174:3-175:10, Ex. 32.</p>
<p>25. [REDACTED] [REDACTED] [REDACTED]</p>	<p>McQuillen Decl. ¶ 6, Ex. E, Abbenhuis Dep. 469:15-471:21; Ex. 31; Am. Compl., Dkt. 16,</p>

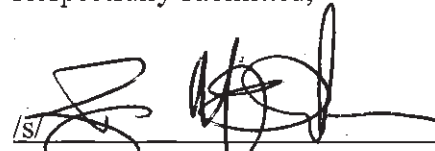
[REDACTED]	Ex. D.
26. [REDACTED]	McQuillen Decl. ¶ 6, Ex. E, Abbenhuis Dep. 107:18-23, 320:2-322:25, ¶ 10, Ex. I; Willemsen Dep. 98:16-17.
27. [REDACTED]	McQuillen Decl. ¶ 6, Ex. E, Abbenhuis Dep. 281:6-282:17, 585:20-586:18.
28. [REDACTED]	McQuillen Decl. ¶ 6, Ex. E, Abbenhuis Dep. 106:16-24; 110:25-111:11; 317:3-6; 320:2-322:25.
29. Neither Schutte Inc. nor Schutte B.V. are using their product configurations “in connection with the sale, offering for sale, distribution, or advertising of any goods...” or “in connection with the sale, offering for sale, distribution, or advertising of goods or services.”	Schutte Mot. to Dismiss Countercl., Dkt. 56, 18.
30. [REDACTED]	Schutte Mot. to Dismiss Countercl., Dkt. 56, 16, 21, 22; McQuillen Decl. ¶ 6, Ex. E, Abbenhuis Dep. 59:24-60:2.
31. With the exception of the CLIPPS G-Series Schutte has not marketed or advertised any of the Schutte Products in the United States.	Pla. Mot. To Dis. p. 18; Pla. Mot. To Dis. p. 16; Pla. Mot. To Dis. p. 21; Pla. Mot. To Dis. p. 22;
32. Schutte Inc. and Schutte B.V. have not used any alleged Kwik Lok mark “in commerce” in the United States.	Schutte Mot. to Dismiss Countercl., Dkt. 56, 16, 22.
33. [REDACTED]	Abbenhuis Decl. in Support of Mot. to Dismiss Countercl., Dkt. 57, ¶ 7.; McQuillen Decl. ¶ 6,



[REDACTED]	Ex. E, Abbenhuis Dep. 59-60; Pla. Mot. To Dismiss 2; Pla. Mot. To Dis. 10; Pla. Mot. To Dis. 17
34. [REDACTED]	McQuillen Decl. ¶ 6, Ex. E, Abbenhuis Dep. 13:23-25; 103:9-11; 117:2-4.
35. [REDACTED]	McQuillen Decl. ¶ 6, Ex. E, Abbenhuis Dep. 41:17-20.
36. [REDACTED]	McQuillen Decl. ¶ 6, Ex. E, Abbenhuis Dep. 41:25-42:3.
37. [REDACTED]	McQuillen Decl. ¶ 6, Ex. E, Abbenhuis Dep. 132:3-6.
38. [REDACTED]	McQuillen Decl. ¶ 6, Ex. E, Abbenhuis Dep. 122:19-123:5
39. [REDACTED]	McQuillen Decl. ¶ 6, Ex. E, Abbenhuis Dep. 57:8-10
40. [REDACTED]	McQuillen Decl. ¶ 6, Ex. E, Abbenhuis Dep. 175:11-14.
41. [REDACTED]	McQuillen Decl. ¶ 6, Ex. E, Abbenhuis Dep. 180:6-8.
42. [REDACTED]	McQuillen Decl. ¶ 6, Ex. E, Abbenhuis Dep. 406:16-18

Dated this 23<sup>rd</sup> day of May, 2014.

Respectfully submitted,

A handwritten signature in black ink, appearing to be "B. McQuillen", is written over a horizontal line.

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